Supreme Court of the United States

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No.

COSMOPOLITAN SHIPPING COMPANY, INC.,

Petitioner,

—v.—

ROBERT A. MCALLISTER,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

THE PETITIONER SEEKS A REVIEW OF A QUESTION ALREADY DETERMINED BY THIS COURT

A proper respect for the Supreme Court of the United States impelled counsel for Robert A. McAllister to advise him that he had a cause of action against the petitioner, Cosmopolitan Shipping Company, Inc., for damages pursuant to the provisions of 46 U. S. C. A. Sec. 688, commonly known as the Jones Act, and on the authority of *Hust* v. *Moore-McCormack Lines*, 328 U. S. 707, an action against the United States Government was unwarranted and unnecessary.

The same proper respect impelled the unanimous Court, opinion by Presiding Justice Hon. Augustus N. Hand, to follow the law as laid down by the Supreme Court of the United States in the case of *Hust* v. *Moore-McCormack Lines, supra,* in affirming the lower Court.

The learned Oregon Court in the case of *Fink v. Shepard S.S. Co.*, 192 P. 2d 258, rehearing denied, 193 P. 2d 537, having failed to be governed by the law as laid down by this Court in the *Hust* case, *supra*, may have given rise to cause for a writ to be issued in said case, but that is hardly justification for the issuance of one in the instant case.

It seems that the position taken at this time by the Solicitor General comes with ill grace, in view of the Government's position in the past as *amicus curiae*, with reference to the Clarification Act. The position which the Government took in the Court below is described by the Court on page 644 of the record in the following language:

> "Moreover, it is to be noted that the government in its brief as amicus curiae makes no claim that the Clarification Act has any bearing on the plaintiff's right of recovery."

The position which the Government took in the *Fink* case, *supra*, is described by the Oregon Supreme Court as follows:

> "The Government, in its brief, takes the position that the Clarification Act 'has no bearing on the present case'" (p. 421).

The weakness of the Government's position is thus demonstrated when one observes that it attempts to get to this Court by a shifting of its former position, and by misstating the facts.

For example, petitioner states on page 12 of its petition that "the agent's authority stops at the water's edge, * * *".

We desire to point out the fallacy of the Government's argument by referring to Article 14 of Defendant's Exhibit

G, which calls for the petitioner to make inspection of the vessel and arrange for the repair of its hull, machinery, equipment and so forth. Such services can hardly be rendered by stopping at the water's edge.

This Court in the *Hust* case, *supra*, did not actually decide the effect of the Clarification Act prospectively, but it did express its views in no uncertain language, at the close of the majority opinion, as follows (pp. 733, 734):

> "Congress was confessedly in a state of uncertainty. But, being so, it nevertheless had no purpose to destroy rights already accrued and in force whether substantive or remedial in character. Its object, in this respect at the least, was to preserve them and at the same time to provide an additional assured remedy in case what had been preserved might turn out for some reason to be either doubtful or lost."

The present position of the Government is contrary to the position taken by it as *amicus curiae* in the cases of *McGowan v. J. H. Winchester & Co. Inc.*, and *Buro v. American Petroleum Transport Corp., et al.*, 168 F. 2d 924, wherein the Government stated on page 29 of its brief as follows:

> "In Caldarola (Caldarola v. Eckert, 332 U. S. 155)*, the Supreme Court dispelled this confusion. The Court reaffirmed that by reason of the manner in which the agency agreement requires them to procure seamen for the United States, the general agents are 'employers' of the seamen within the technical meaning of the Jones Act so that an injured seaman can bring the

* Citation added.

statutory action against such an 'employer' (See 332 U. S. at 159)."

The judicial suggestion in the case of *Brady v. Roosevelt S.S. Co.*, 317 U. S. 575, that for Congress to effect a "substantial dilution of the rights of claimants" (p. 581), by granting immunity from suit to private operators of government owned vessels, there must be clear and unambiguous legislation, has been repeated by the United States Supreme Court in the *Hust* case, *supra*, as follows:

"We may assume that Congress could authorize so vast a disturbance to settled rights by clear and unequivocal command. It is not permissible to find one by implication. Brady v. Roosevelt S.S. Co., supra, 317 U. S. at 580" (p. 722).

The United States Supreme Court itself pointed out in the *Hust* case, *supra*, that the Clarification Act and its legislative history did not contain a "clear and unequivocal command", by stating as follows:

"The entire history will be read in vain, however, for any clear expression of intent or purpose to take away rights, substantive or remedial, of which the seaman had not already been deprived, actually or possibly, by virtue of the transfer" (p. 733).

Saving to seamen their rights and remedies under the Jones Act, against general agents of the War Shipping Administration, can have no effect one way or the other on the rights and remedies of other claimants, as pointed out in the *Caldarola* case, *supra*, wherein this Court pointed out that only for the purposes of the Jones Act is the agent considered the employer of the seaman.

It is true that the question now before the Court has been of great importance in the past, however, that is not the present situation. This Court may well take judicial notice of the fact that practically all ships formerly operated by the War Shipping Administration, are back in the hands of private operators. Congress can enact law in clear and unequivocal language if it desires to curtail the rights of seamen or if it desires to grant immunity to private ship operators engaged on behalf of the Government.

We are dealing with a man who will have to spend the rest of his life going around with the lower part of his body encased in braces; who is unable to move without the aid of crutches; who will be required to endure mental anguish, physical pain and personal embarrassment for the balance of his life; who is 28 years of age, married and the father of two children; who is dependent entirely upon a mere pittance in the form of charity by the City of New York for the existence of himself and his family; who cannot secure special medical and surgical treatment which the Government has no facilities to provide him; who has pursued his remedy in accordance with the law as laid down by this Court at the time he recommenced his action, and to whom any delay occasioned by the granting of the petition herein would impose an unwarranted further hardship.

Justice should not be delayed, nor should the thought be entertained that a seaman can be deprived of a jury trial without specific and unequivocal legislation to said effect.

In being guided by the opinion of this Court, Mr. McAllister has surrendered his right to pursue any remedy against the United States of America now being barred by the statute of limitations.

It might be in place to point out that none of the cases cited by petitioner, except the *Fink* and *Hust* cases, *supra*, deals with the rights of a seaman under the Jones Act. The common law rules of agency have no application here.

Technically, Mr. McAllister was an employee of the Government, but actually, Cosmopolitan Shipping Company, Inc., exercised as much control as any operating steamship company ever did, of its own vessels. All that is required in Federal practice is to show substantial control and not complete and exclusive control. *Quinn* v. *Southgate-Nelson Corporation*, 121 F. 2d 190, c. d. 314 U. S. 682. In any event, this question has already been disposed of in the *Hust* case, *supra*.

Petitioner failed to cite a single instance where the Government was embarrassed, or the operation of its vessels interfered with, by reason of the holding in the *Hust* case, *supra*.

The provisions of the Jones Act cannot possibly be considered as the valid basis for an action for breach of contract or for the payment of unemployment insurance taxes.

The question of interference with Government vessels in time of emergency has now become moot.

The decision by the United States Supreme Court in the *Hust* case, *supra*, should not be opened to question, merely on the basis that the Oregon Supreme Court has decided the *Fink* case, *supra*, in apparent conflict therewith.

We would like to point out one of the weaknesses in the decision in the *Fink* case, *supra*.

The decision is based in part on the opinion of Justice Augustus N. Hand in the case of *Shilman* v. *United States*, 164 F. 2d, 649. Judge Hand points out wherein the Oregon Court erred in interpreting his opinion, in the following

language in the opinion in the instant case, on page 643 of the record.

> "We stated that the Caldarola decision and that of this court in Shilman v. United States, 164 F. 2d 649, had narrowed the holding in Hust v. Moore-McCormack Lines, 328 U.S. 707, to the extent (fol. 646) that such a general agent was liable as an 'employer' only to seamen on the vessel who are injured as a result of negligence in connection with its operation."

The Court in the case of *Gaynor* v. *Aguilines, Inc.*, 76 F. Supp. 617, affirmed, 1948 A. M. C. 1322 also relied in part on the same decision in the *Shilman* case, *supra*, and totally disregarded the opinion in the *McAllister* case, *supra*.

The right of a seaman to a jury trial should not be interfered with, particularly where the seaman has surrendered all other rights in reliance on the decision by this Court, and proceeded to judgment in accordance with the law as laid down by this Court.

The petition is without merit, the question sought to be reviewed has already been decided by this Court, and accordingly, said petition should be denied.

Respectfully submitted,

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